

No. 15971

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

WILSHIRE HOLDING CORPORATION,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

Petition to Review a Decision of the Tax Court of the
United States.

APPELLANT'S OPENING BRIEF.

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Statement of the Case.

This is an appeal from the decision of the Tax Court of the United States holding that there are deficiencies of \$1,584.00 in declared value excess-profits tax, \$3,097.83 in excess-profits tax, and \$1,834.06 in income tax for 1945, and a deficiency of \$2,798.20 in income tax for 1946 [Tr. of R. p. 17].

Jurisdiction.

The jurisdiction of this Court is invoked under Title 26, United States Code, Section 7482(a)(b)(1). The pleadings relied on are Motion for Entry of Decision Pursuant to Mandate, Objections to Motion for Proposed Entry of Decision, Petitioner's Computation of

Alleged Tax Liability, Petition for Review, and Statement of Points On Which Petitioner Intends to Rely on Appeal [Tr. of R. pp. 3, 4-6, 6-11, 20-22, 22-23].

The tax returns for the years involved were filed with the Collector of Internal Revenue for the Sixth District of California [Tr. of R. pp. 21-22].

Statement of Facts.

(Note: The Transcript of Record on p. 8 states, "Proposed increase in net income arising from annual capitalization of 12/212ths of \$75,000 value of land; length of lease 212 months". The figures 212 in both instances should read 812.)

In the case of Commissioner of Internal Revenue vs. Wilshire Holding Corporation, No. 14,100 of the United States Court of Appeals for the Ninth Circuit, the Circuit Court granted a motion of the Commissioner to summarily reverse the decision of the Tax Court.

The case was consolidated in the Tax Court with the case of Walburga Oesterreich vs. Commissioner of Internal Revenue, No. 13,924. Pursuant to a stipulation of the parties, proceedings on appeal in case No. 14,100 were held in abeyance pending the decision of the Court in the Oesterreich case No. 13924.

The Circuit Court, in the case of *Walburga Oesterreich v. Commissioner of Internal Revenue*, 226 F. 2d 798, held that the contract between Oesterreich and Wilshire Holding Corporation constituted a sale of real property, instead of a lease.

The decision in the Oesterreich case was the basis for granting the motion of the Commissioner to sum-

marily reverse the Tax Court in the Wilshire Holding Corporation case.

After the ruling was made summarily reversing the Tax Court, the Commissioner made a Motion for Entry of Decision Pursuant to Mandate [Tr. of R. p. 3].

Objections to the Motion for Proposed Entry of Decision were filed by Wilshire Holding Corporation on the basis that it is incumbent on the Tax Court to make a determination of what part of each payment is going toward the acquisition of the land and to what extent Wilshire Holding Corporation has an equity [Tr. of R. pp. 4-6].

Petitioner filed a computation of alleged tax liability [Tr. of R. pp. 6-11], showing the income tax deficiency under two alternate plans. The computations submitted by the petitioner were based on a schedule marked "Exhibit A" [Tr. of R. pp. 8-11]; and on the opinion of the United States Court of Appeals, reversing the decision of the Tax Court of the United States in the Oesterreich case, wherein the Court stated, "Certainly a part of each payment is going toward the acquisition of this land, and to this extent Wilshire Corporation does have an equity". 226 F. 2d 798, 803.

The Tax Court, in its decision, held that the language of the Court of Appeals was misconstrued, and the Tax Court made its determination of deficiencies owing on the basis that the entire payment by Wilshire Holding Corporation to Oesterreich was subject to capitalization, instead of any portion of it being deductible as an expense [Tr. of R. pp. 17-19].

Petitioner filed its Petition for Review to review the adverse decision of the Tax Court, entered on February

6, 1958, ordering deficiencies sought by the Commissioner in his Motion for Entry of Decision, wherein complete disallowance was made of all payments from Wilshire Holding Corporation to Oesterreich [Tr. of R. pp. 20-22].

Specification of Error.

The Tax Court erred in computing the tax deficiencies on the basis that the entire payments under the contract between Wilshire Holding Corporation and Oesterreich are to be capitalized and that no part of them may be deducted as an expense.

Question Presented by Appellant.

Is the computation of tax deficiencies for entry of decision under mandate in accord with the opinion and decision of the United States Court of Appeals for the Ninth Circuit rendered in the case of *Walburga Oesterreich v. Commissioner*, 226 F. 2d 798, which was used by the Court as the basis for summarily reversing the decision of the Tax Court in the within case?

ARGUMENT.

The Computation of Tax Deficiencies by the Tax Court Was Erroneous.

The United States Court of Appeals for the Ninth Circuit, in its opinion and decision rendered in the companion case of *Walburga Oesterreich v. Commissioner*, 226 F. 2d 798, held that the contract between Oesterreich and Wilshire Holding Corporation constituted a sale of real property instead of a lease.

It was this decision that was used by the Circuit Court as the basis of summarily reversing the decision of the Tax Court in the case of *Commissioner vs. Wilshire Holding Corporation*, No. 14,100.

The Circuit Court in its Opinion stated, "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity". *Oesterreich v. Commissioner*, 226 F. 2d 798, 803. Appellant contends that the quoted portion of the Circuit Court's Opinion means that only a portion of each payment made by Wilshire Holding Corporation to Oesterreich under the contract is to be capitalized in determining the reassessment of taxes owing by Wilshire Holding Corporation.

The highest value of the land in 1929, the date of the contract, was \$75,000 [Orig. Tr. p. 74; Dep. pp. 18, 46]; the length of the contract is 812 months. Therefore, the capitalization for each year should be 12/812ths of \$75,000.

The total amount to be paid under the contract is \$679,380. Obviously, the parties never intended, nor should the Court contend, that \$679,380 was to be paid for land appraised at \$75,000. Petitioner contends this is particularly true in the light of the fact that the building in question is a single-purpose building (a motion picture theatre building), desperately trying to hold its own against the crushing development of television.

On the basis of the foregoing formula [Ex. A, Tr. of R. pp. 8-9], there is an income tax deficiency of \$259.76, and a declared value excess-profits tax deficiency of \$146.30 for the year 1945, and an income tax deficiency of \$254.91 for the year 1946.

The non-deductible payment each year to be capitalized is \$1,108.37, as shown in Exhibit A [Tr. of R. p. 8]. It is this "non-deductible payment" which goes toward acquiring an equity in the property appraised at \$75,000 in 1929, the year of the contract.

Conclusion.

The decision of the Tax Court determining the amount of deficiencies owing by Wilshire Holding Corporation should be reversed, and an order made determining the deficiency to be \$259.76 for income tax; and \$146.30 for declared value excess-profits tax for 1945, and \$254.91 for income tax for the year 1946; or the case should be remanded to the Tax Court for the purpose of making a determination of what part of each payment made by Wilshire Holding Corporation to Oesterreich is going toward the acquisition of the land and to what extent Wilshire Holding Corporation does have an equity, so it may be determined what portion of the payments shall be charged to capital as the purchase price of the real property, and what portion shall be charged to a deductible expense as rent or interest.

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